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No. 89-815 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

SHEREE K. CHALINE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the United States was a "statutory employer" under Louisiana's workers' compensation law, applicable to the United States under the Federal Tort Claims Act, and was thus not liable in tort to petitioner for injuries she sustained while delivering bulk mail between post offices under a contract between the Postal Service and petitioner's immediate employer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A10) is reported at 887 F.2d 505. The oral opinion of the district court (Pet. App. C15-C2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered August 18, 1989. An order treating petitioner's suggestion for rehearing en banc as a petition for rehearing and denying it was entered September 20, 1989 (Pet. App. B12-B13). The petition for a writ of certiorari was filed November 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, the employee of a contractor for the United States Postal Service, severed her achilles tendon on a door at the loading dock of the United States post office in Deridder, Louisiana. At the time, petitioner was delivering bulk mail from the post office in Lake Charles, Louisiana, pursuant to a contract between Holley Mail Service and the Postal Service (Pet. App. A4). Petitioner brought suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2674, alleging that her injury was caused by the negligence of the Postal Service.

The district court dismissed petitioner's action, holding that under Louisiana law, the United States was not liable in tort because petitioner's exclusive remedy arose under the applicable workers' compensation statute. The court reasoned that the workers' compensation exclusion applied to this case, because the United States was petitioner's "statutory employer." Pet. App. C15-C19.

2. The court of appeals affirmed. Pet. App. A2-A10. The court began by observing that the FTCA "permits recovery in tort against the United States only 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission ocurred.' " *Id.* at A6 (quoting 28 U.S.C. 1346(b)). Under Louisiana law, the court noted, a principal is not liable in tort to the employees of a contractor performing work for the principal "if the work contracted out is part of the principal's 'trade, business, or occupation.' " Pet. App. A6 (citing La. Rev. Stat. §§ 23:1032, 23:1061 (West 1985)). In that situation, the court explained, "the principal is deemed to be the 'statutory employer' of the injured employee, whose sole remedy is under Louisiana's workers' compensation law." *Ibid.*

Applying those principles, the court concluded that the United States was petitioner's "statutory employer." The court relied on standards set forth in prior Fifth Circuit cases for analyzing whether a government entity is a statutory employer. Pet. App. A7-A8 (citing *Herbert* v. *United States*, 860 F.2d 607, 608 (1986) (per curiam); *Leigh* v. *NASA*, 860 F.2d 652, 653 (1988)). The court rejected petitioner's contention that the "more stringent definition of a statutory employer" announced in *Berry* v. *Holston Well Service, Inc.*, 488 So.2d 934 (La. 1986), should govern here. The court reasoned that *Berry* "does not apply when a governmental entity is the employer." Pet. App. A7.

ARGUMENT

Petitioner challenges the court of appeals' holding that Louisiana's "statutory employer" doctrine bars her FTCA claims. The issue of state law that underlies that holding presents no question of national importance and does not warrant review by this Court. In any event, even if the legal standards endorsed by petitioner were applied to her claim, petitioner would not prevail on the particular facts of this case. Finally, the state statute at issue has been amended so as to render the question presented of no continuing significance.[1]

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[1] We also note that the petition may be jurisdictionally out of time under 28 U.S.C. 2101(c). The judgment of the court of appeals was entered August 18, 1989 (Pet. App. A2); the petition for certiorari was filed November 17, 1989, ninety-one days after entry of the judgment. Although a timely petition for rehearing would have tolled the time for filing a petition for a writ of certiorari (see Sup. Ct. R. 20.4 (1980)), petitioner did not file a petition for rehearing; instead, she filed a suggestion for rehearing en banc, which the panel treated as a petition for rehearing in accordance with local Internal Operating Rule 35 (and denied). Consequently, the time for seeking certiorari

a. Under the Federal Tort Claims Act, the United States is liable for torts only if a private individual would be liable under like circumstances, in accordance with the law of the place where the alleged negligent act occurred. 28 U.S.C. 1346(b), 2674; *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64-65 (1955). There is no dispute that Louisiana law governs petitioner's claim. Under Louisiana law, the principal for whom a contractor is performing work is not liable for injuries suffered by the contractor's employees if the work contracted out is part of the principal's "trade, business, or occupation." Rather, in such circumstances the principal is deemed to be the "statutory employer" of the injured employee, and the employee's sole remedy is under Louisiana's workers' compensation law. La. Rev. Stat. § 23:1032 (West 1985). Since the Postal Service here contracted out work that was undeniably part of its "trade, business, or occupation," namely, delivering mail, it was a principal under Louisiana law, and, therefore, was petitioner's statutory employer. Hence, petitioner's tort claim was precluded under Louisiana law.

Petitioner contends (Pet. 6-17) that the court of appeals applied an incorrect legal test in determining whether the Postal Service was petitioner's "statutory employer." In petitioner's view, instead of applying the more rigorous standards for private entities announced in *Berry* v. *Holston Well Service, Inc.*, 488 So.2d 934 (La. 1986), the court below erroneously relied on standards that govern the inquiry when a governmental entity has contracted out work.

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may have expired before petitioner filed the instant petition. Cf. *Missouri* v. *Jenkins*, No. 88-1150 (argued Oct. 30, 1989); Sup. Ct. R. 13.4 (1990) ("A suggestion made to a United States court of appeals for rehearing in banc pursuant to Rule 35(b) * * * is not a petition for rehearing within the meaning of this Rule.").

Whatever the merits of that claim, it does not warrant the attention of this Court. To begin with, the determination of the appropriate rule of law in this case depends primarily on the proper interpretation of Louisiana state law, an area with which the court of appeals has greater familiarity than this Court. In *Thomas* v. *Calavar Corp.*, 679 F.2d 416, 420 (1982), the Fifth Circuit, after an extensive examination of Louisiana precedents, articulated standards for applying the Louisiana "statutory employer" doctrine under the FTCA. Although the Louisiana Supreme Court in *Berry* subsequently modified the standard for determining whether a defendant is a "statutory employer," that case involved a private employer, and the Fifth Circuit has concluded that the analysis set forth in *Thomas* continues to govern the "statutory employer" issue in cases brought under the FTCA. *Herbert* v. *United States*, 860 F.2d at 608 ("*Berry* * * * does not modify the rule of *Klohn* v. *Louisiana Power & Light*, 406 So. 2d 577 (La. 1981), or *Thomas* * * *, which analyze the statutory employer status of governmental entities."); *Leigh* v. *NASA*, 860 F.2d at 653 (same).

The question whether the Fifth Circuit has correctly interpreted the impact of *Berry* on Louisiana law, as applied to the United States through the FTCA, does not merit further review by this Court. See *Bowen* v. *Massachusetts*, 108 S. Ct. 2722, 2739 (1988) ("We have a settled and firm policy of deferring to the regional courts of appeals in matters that involve the construction of state law."); *Frisby* v. *Schultz*, 108 S. Ct. 2495, 2500 (1988) ("Following our normal practice, 'we defer to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective States.' ") *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 395 (1988) ("This Court

rarely reviews a construction of state law agreed upon by the two lower federal courts."); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985).[2]

b. Even if petitioner were correct that the standards of *Berry* are controlling, the Postal Service would still be deemed to be petitioner's statutory employer.[3] Under

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[2] Petitioner argues that the court's holding conflicts with the FTCA's requirement that the liability of the United States be determined under state law as if it were a private person, stating (Pet. 15) that the United States must in all respects be equated to a private citizen under the FTCA. We note that some FTCA cases have considered state rules of law that have particular application to governmental tort defendants. See, *e.g.*, *Louie* v. *United States*, 776 F.2d 819, 825 (9th Cir. 1985) ("a determination of the government's [FTCA] liability under Washington law [for actions involving a law enforcement function] rests properly on an examination of the liability of the state or a municipality under like circumstances"); *Doggett* v. *United States*, 858 F.2d 555, 561 (9th Cir. 1988) (where "unique governmental functions" are involved, court seeks "to determine what liability state law attaches to * * * analogous entities subject to its jurisdiction"). Other cases have declined to look to rules of liability for state entities or their political subdivisions rather than private employers. See *Raymer* v. *United States*, 660 F.2d 1136, 1140-1142 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982); *Ewell* v. *United States*, 776 F.2d 246, 248-249 (10th Cir. 1985). Compare *United States* v. *Muniz*, 374 U.S. 150, 164 (1963) (state immunities for prison officials inappliable to suits by prisoners against the United States under the FTCA); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 65 (1955). However, whether or not this issue might merit consideration in some other case, it is not squarely presented here. As we show below (at 6-7), petitioner's claim does not satisfy either of the standards drawn from state law.

[3] Because the government prevailed below, the judgment may be defended "on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). In the court below, the government urged that the United States would qualify as a statutory

Berry, an employer hiring an independent contractor is considered a "statutory employer" if (1) the contract work is routine and customary and does not require a specialized degree of skill, training, and experience; (2) the work is part of the employer's own trade or business and the employer is capable of performing it; and (3) the employer is engaged in the enterprise at the time of the accident. 488 So.2d at 938-939. Each aspect of that test is satisfied in this case.

First, the delivery of mail, especially bulk, consists only of driving a truck and loading and unloading packages. It is routine and customary, and does not require specialized skill. Second, the delivery of mail is the Postal Service's business, 39 U.S.C. 101, and it is obviously capable of performing it. The Postal Service has approximately 875,000 employees dedicated to delivering mail, and so the work is hardly unique to contractors. Finally, the Postal Service was engaged in its mail delivery enterprise at the time of the accident, as it has been for many years. Gov't C.A. Br. 13-14, 25-28. Consequently, the application of the *Berry* test, as petitioner urges, is of no assistance to her.

c. At all events, the question whether *Berry* should apply to petitioner's claim is purely of historical interest. The provision that defines the liability of a principal to employees of a contractor, La. Rev. Stat. § 23:1061 (West 1989), was recently amended. See Act No. 454, § 3, 1989 La. Sess. Law Serv. 1114 (West) (effective Jan. 1, 1990). The amended statute now states:

> The fact that work is specialized or nonspecialized, is extraordinary construction or simple maintenance, is work that is usually done by contract or by the prin-

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employer under the *Berry* test. See Gov't C.A. Br. 13-14, 19, 25-28. Thus, the government may rely on that ground in defending the judgment here.

> cipal's direct employee, or is routine and unpredictable, shall not prevent the work undertaken by the principal from being considered part of the principal's trade, business, or occupation, regardless of whether the principal has the equipment or manpower capable of performing the work.

La. Rev. Stat. § 23:1061 (West 1989). This language effectively overrules the three-factor analysis set forth in *Berry*. Thus, the issue raised by petitioner is of no continuing importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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